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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

AMALGAMATED LITHOGRAPHERS OF AMERICA (IND.) AND LOCAL NO. 17 OF THE AMALGAMATED LITHOGRAPHERS OF AMERICA (IND.), *Petitioners,*

v.

NATIONAL LABOR RELATIONS BOARD, AND LITHOGRAPHERS AND PRINTERS NATIONAL ASSOCIATION, INC. AND EMPLOYING LITHOGRAPHERS ASSOCIATION, A DIVISION OF THE GRAPHIC ARTS EMPLOYERS ASSOCIATION, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR LITHOGRAPHERS AND PRINTERS NATIONAL ASSOCIATION, INC. AND EMPLOYING LITHOGRAPHERS ASSOCIATION, A DIVISION OF THE GRAPHIC ARTS EMPLOYERS ASSOCIATION, IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. 23-45) is reported at 309 F. 2d 31. The Board's decision and order (R. 53-73)[1] are reported at 130 NLRB 985.

[1] "R." references are to the Transcript of Record in the court below.

JURISDICTION

Jurisdictional requirements are adequately set forth in the petition and in the brief of the National Labor Relations Board in opposition to the petition.

QUESTIONS PRESENTED

1. Is Section 8(e) of the National Labor Relations Act, as amended, unconstitutional insofar as it grants an exemption to the employers in the clothing and apparel industry from its blanket proscription to all other employers, within the purview of the Act, from entering into contracts with labor organizations which contain so-called "hot cargo" clauses whereby the employer agrees to refrain from handling the products of, or doing business with, another employer or person?

2. Whether a strike by the petitioning unions against the Employing Lithographers Association, a Division of the Graphic Arts Employers Association, of San Francisco, California, the purpose of which was to force the employer-members of the Association to agree to certain contract language, is in violation of the proscription of Section 8(e) of the Act.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in Appendix A, *infra*, p. 13.

STATEMENT

The charging party, the Employing Lithographers Association, a Division of the Graphic Arts Employers Association, of San Francisco, California (hereinafter

called the "Association"), is an association of lithographic employers located in and around San Francisco, California. Its primary purpose is the negotiation and administration of labor contracts, on behalf of its members, with Local 17 of the Amalgamated Lithographers of America. The Association's members employ approximately one-half of the lithographic craftsmen in the San Francisco area. There are one hundred other lithographic employers in this area who are not members of the Association (hereinafter called the "Independents") who employ the remaining lithographic craftsmen in this area.

The Lithographers and Printers National Association, Inc. (hereinafter called "LPNA") is a national trade association made up of members throughout the United States who employ lithographic craftsmen. Foremost amongst its purposes is the stabilization of labor-management relations in the industry. Because of the far-reaching effects of the questions presented by the Union's adamant demand for the inclusion of certain contract language in the contract being negotiated between the Association and Local 17, LPNA filed independent charges against the Union before the National Labor Relations Board and intervened in the enforcement proceeding before the Court of Appeals for the Ninth Circuit.

Under custom of long standing, the Association negotiated labor contracts with Local 17, and the Independents would then adopt this contract. All of the contract clauses presented to the Association by Local 17 were originated by the International Union, and Local 17 did not have the authority to agree to any changes in these clauses without the specific consent of the International (R. 11; 417, 435-439).

Prior to the termination of the then current labor contract, Local 17, on August 17, 1959, notified the Association that they desired to renegotiate the labor agreement which by its terms terminated on October 18, 1959. Thereafter, the parties negotiated jointly, having some sixteen meetings between September 9, 1959 and November 20, 1959 (R. 14; 146, 89, 105-106).

During the course of these negotiations, Local 17, by authorization and direction of the International Union, insisted that the Association include in the new contract five clauses which may be described as "control" clauses. Clauses similar to these had been included in the expiring contract, but the old clauses were clearly illegal under the then recent amendments to the National Labor Relations Act, *supra* (R. 14; 195-202, 212, 205, 165, 148, 180-185, 221, 89, 105-106, 152, 163, 174, 269-270, 290-298).

In order to assert maximum pressure upon the employers, Local 17 ordered all its members to refuse to work overtime (R. 25; 239-240, 246, 417). This ban was enforced from October 21, 1959 until Local 17, with approval of the International, called a full strike against members of the Association on November 23, 1959 (R. 18; 275, 93-94, 106-107, 230-232, 266-267, 269-270, 284-289). During this period Local 17, through its President, insisted that the disputed clauses "had to be put in the contract or there would be no contract" (R. 17-18; 271-272). The strike continued until January 13, 1960 when the district court, in a Section 10(1) proceeding under the Act, declared the purposes of the strike were in violation of Section 8(e) and therefore illegal.

The clauses which Local 17 demanded be included in the contract, and which the Union claimed were not subject to negotiation at the bargaining table, were:

TRADE SHOP WORK: (a) The parties agree that all the terms of this contract have been negotiated on the assumption that all lithographic production work will be done under approved union wages and conditions. In the event any employer covered by this contract requests any employee to handle any lithographic production work made in any shop which was not under contract with the Amalgamated Lithographers of America and authorized to use the union label of the Amalgamated, then the Union in its discretion by notice in writing, may re-open the contract as to that employer for negotiations as to the whole or any part thereof. In the event of failure to agree on all terms within ten days after such re-opening, the Union shall have the right to terminate the contract forthwith as to that employer by giving written notice to such employer.

(b) Union trade shops must affix the Union label on all their products before sending them to any other shop.

(c) Finished lithographic press plates which are sent out of any plant (unless for regraining) shall have the Union label and the name of the plant in the plate, except that as to plates heretofore made this may be done by otherwise attaching the Union label and name of the plant to the plate. Any negatives or positives sent out of a plant shall bear the Union label and the name of the plant.

(d) Upon request by the shop delegate an employer shall advise him of the source of any lithographic work brought into the plant from the outside. Such request shall not interfere with the normal production of the plant.

STRUCK WORK: The Employers agree that they will not render assistance to any lithographic employer any of whose plants is struck by any Local of the Amalgamated Lithographers of America or the International or where members of any such Local or the International are locked out, and accordingly agree that in implementation of this purpose the employees covered by this contract shall not be requested to handle any lithographic work (other than work actually in process in the plant) customarily produced by such employer.

TERMINATION: In the event an employer requests any employee to handle any work described in paragraph (Section 23) above, or requests any employee to handle any work received from or destined for any employer involved in such strike or lockout, directly or indirectly (other than work actually in process in the plant), the Union, in addition to the other rights and remedies the employees and the Union have under this contract or the law, shall have the right in its discretion to terminate the contract forthwith as to that employer by giving written notice to said employer.

REFUSAL TO HANDLE: The Employers agree that they will not discharge, discipline or discriminate against any employee because such employee refuses to handle any lithographic production work which was made in a shop not under contract with the Amalgamated Lithographers of America or not authorized to use the union label of the Amalgamated or because such employee refused to handle any struck lithographic work of the type described in Sections 23 and 24.

CHAIN SHOP: The Employers agree that the employees covered by this contract shall not be requested to handle any work in any plant if in another plant of any employer or any subsidiary of such employer in any part of the United States,

or Canada or any Local of the Almalgamated Lithographers of America or the International is on strike or members of such Local or International are locked out.

THE DECISIONS BELOW

Following the strike on November 23, 1959, the General Counsel sought and obtained an injunction on the basis that the strike was illegal. *Brown* v. *Local 17, Amalgamated Lithographers of America, et al.*, 180 F. Supp. 294. The Board, after a full hearing, found that all of the clauses which the Union sought to include in the contract were illegal. 130 NLRB 985. The Court of Appeals for the Ninth Circuit then found three of the clauses, *supra*, pp. 5, 6, to be illegal and, by reconstructing the language in the "Struck Work" and "Chain Shop" clauses, held these clauses could be construed as valid (Board's brief, p. 3, n. 3). The Board then sought a rehearing on the circuit court's decision which was denied on November 9, 1962 (Pet. App. C, 48). Despite a conflict between the decision of the circuit court for the Ninth Circuit and the circuit court for the Fifth Circuit (*Employing Lithographers of Greater Miami, Florida* v. *N.L.R.B.* and *N.L.R.B.* v. *Amalgamated Lithographers of America, et al.*, 301 F. 2d 20 (1962)), the Board has not sought a cross-petition for certiorari in regard to the "Struck Work" and "Chain Shop" clauses.

ARGUMENT

I. The Provisos Exempting Other Industries Do Not Make Section 8(e) Unconstitutional

The legislative history of the 1959 amendments shows the grounds on which Congress, with knowledge of similar practices in the printing industry, chose to exempt only the construction and apparel and clothing industries from the ban on "hot cargo" clauses imposed by Section 8(e).[2]

Congress made it clear why it felt that these industries alone should be permitted the practices and contract provisions barred to others, including the printing industry. In any case, the basic regulatory enactment should not fall, even if the exemptions were, contrary to the fact, arbitrary. Here, we submit the differences between the exempt and other industries justify the exemption. *Brown* v. *Local 17, supra*, analyzes the authorities in point and, we urge, reaches the proper conclusion, 180 F. Supp. 305.

The analysis of Judge Sweigert's decision in *Brown* v. *Local 17, Amalgamated Lithographers of America, et al., supra*, completely answers the allegations of the unconstitutionality of these exemptions:

> "With this view of the matter we review the well-established rules by which the constitutionality of Congressional enactments under the Commerce Clause, Article 1, Section 8, Clause 3, involving discriminations, classifications and exemptions, should be determined by the courts.
>
> "The courts have stressed that the Fifth Amendment, unlike the Fourteenth Amendment, contain

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[2] H. Rep't 1147, 86th Cong. 1st Sess., pp. 943-944; Legislative History (1959) 943-944.

no equal protection clause. See: *Currin* v. *Wallace*, 306 U.S. 1, 13-14 (1938).

"Assuming, that there might be a discrimination of such injurious character as to bring into operation the due process clause of the Fifth Amendment, *Bolling* v. *Sharpe*, *supra*, mere lack of uniformity in the Congressional exercise of the commerce power does not constitute a denial of due process, *Currin* v. *Wallace*, *supra*.

"Almost without exception the courts have refrained from applying the uniformity principle as a restriction upon the Congressional exercise of the commerce power. They have recognized that economic problems are practical problems, and that their solution often requires considerable latitude and flexibility. Accordingly, they have upheld numerous statutory schemes of far-reaching economic importance, involving incidental discrimination. *Hirabayashi* v. *United States*, 320 U.S. 81 (1943); *Detroit* v. *United States*, 317 U.S. 329 (1943); *Sunshine Coal Co.* v. *Adkins*, 310 U.S. 381 (1939); *Steward Machine Co.* v. *Davis*, 301 U.S. 548 (1937); *District of Columbia* v. *Brooke*, 214 U.S. 138 (1909).

"The Labor-Management Relations Act of 1947 has, itself, withstood constitutional attack, although it provides exemptions for agricultural workers, domestic help, railway employees, employees of non-profit hospitals, employees of governmental instrumentalities, and supervisory employees. See: *NLRB* v. *Budd Manufacturing Co.*, 169 F. 2d 571 (6th Cir. 1948); *Brown* v. *Roofers Local 40*, 86 F. Suppl. 50 (N.D. Cal. 1949).

"In dealing with Congressional enactments under the commerce clause, the Courts are dealing with a plenary power of the Congress, complete in itself, and, they must, and traditionally do, extend wide latitude. It is not for the Courts to super-

wise policy or the extent to which that policy should go. In this field the Congress need not deal at one time with all the evils it may observe. It may proceed by cautious advance, step by step. It may choose the commodities, industries and places with which it will deal, *NLRB* v. *Jones & Laughlin Steel Co.*, 301 U.S. 1, 46 (1937); *Currin* v. *Wallace*, *supra*; *Sunshine Coal Co.* v. *Adkins*, *supra*; *Hirabayashi* v *United States*, *supra*.

"In the present situation, we are not inclined to assume that the language contained in the House Management Report (but not in the Senate Report or in the Act itself) represents the final view of the Congress.

"Even if it did, there would still be a strong presumption that other reasonable considerations existed to support the exemption of the garment industry as distinguished from the lithographic industry. The garment industry exemption need not have been based solely upon the integrated nature of its work processes. Other economic and social circumstances peculiar to the garment industry may well have prompted the exemption. See e.g., Cong. Rec. Senate, Sept. 3, 1959, p. 1643, BNA, *supra*, at 472.

"Therefore, we conclude that Section 8(e) must be deemed a valid Congressional exercise of the commerce power."

Moreover, the Union's contention that Congress enacted the provisos without a proper understanding of the integration in the lithographic industry must fall. It is clear that Congress not only understood the problems of the integrated nature of the apparel and clothing industry, but also was well aware of the manner in which the entire printing industry conducted its operations (*Employing Lithographers of Greater Mi-*

ami, Florida v. *National Labor Relations Board, supra*).[3]

Thus, although Congress was aware of the existence of "hot cargo" clauses in the printing industry, Congress in its discretion did not choose to extend the exemption granted to the apparel and clothing industry to any other industry. This right of Congress to enact legislation of this nature is substantially supported in Judge Sweigert's opinion in *Brown* v. *Local 17, supra.*

II. The Strike to Obtain Inclusion of So-Called "Control" Clauses Was in Violation of the Act

The contract clauses set forth *supra*, pp. 5, 6, 7, clearly, *in toto*, as well as individually, contemplate that the members of the Association will cease doing business with any other empoyer who has no contract or has a contract dispute with the Union, or any of its locals throughout the entire United States. Insofar as the strike and economic pressures sought to compel not only the illegal provisions, but the practices of ceasing doing business with other employers for which those clauses provided, the conduct of Local 17 and the International Union violated Section 8(e) of the National Labor Relations Act. *N.L.R.B.* v. *Denver Building & Construction Trades Council*, 341 U.S. 675:

[3] During the debate on the committee bill (H.R. 8342) and the Landrum bill (H.R. 8400), Congressman Rhodes of Arizona referred to the fact that a ban on "hot cargo" clauses "would accomplish a much needed reform," since "not only do most Teamster contracts contain such clauses but various building and printing trade unions have insisted on contracts under which employees are excused from handling certain prefabricated products, products which do not bear the label of a particular union, or products manufactured by a company dealing with some other union." *Legislative History of the Labor Management and Disclosure Act of 1959*, U. S. Gov. Print. Off. (1959), p. 1581.

N.L.R.B. v. *Local 294, International Brotherhood of Teamsters (Van Transport Lines, Inc.)*, 298 F. 2d 105. The Court need only look at the face of the Act to see that these provisions set up an agreement whereby the employer ceases or refrains, or agrees to do so, from handling, using or otherwise dealing in the products of other employers, as prohibited by Section 8(e).

In determining the Congressional intent, "the very language in which Congress has expressed its policy" is "most relevant, of course." (*Local 1976, Carpenters, etc.* v. *N.L.R.B.*, 357 U.S. 93 at 100), *Unexcelled Chemical Co.* v. *U. S.*, 345 U.S. 59, 64. This is one situation in which we have such a clear expression.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted.

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APPENDIX A

Statute

Section 8(e). It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceible and void: *Provided*, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection (e) and section 8(b)(4)(B) the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer," "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception.